U.S. Department of Justice

Washington, D.C. 20530

Honorable Paul A. Magnuson
United States District Judge
District of Minnesota
754 Federal Court Building
316 North Robert Street
St. Paul, Minnesota 55101

Dear Judge Magnuson:

Re: Reilly Tar & Chemical Corp. v. United States of America, et al., Civil Action No. 3-45-473

The federal defendants were very pleased to receive your memorandum order of April 5, 1985, in the above-entitled case. We are, however, somewhat concerned about certain statements appearing in footnote 5, on page 20 of your opinion. In hopes of avoiding any unnecessary confusion over the meaning of footnote 5, I am writing to seek clarification of or, if the Court would prefer, the opportunity for further briefing of the issues discussed in footnote 5.

While the government fully agrees that a responsible party should not be held liable for response costs that are not cost effective, we are concerned with certain statements regarding the burden of proof and and standard of review in actions under CERCLA. As this Court knows, these latter issues were not directly before this Court in Reilly Tar's challenge to the constitutionality of administrative orders under CERCLA Section 106, 42 U.S.C. 9606. While these issues were not central to the Court's ruling, they will have to be resolved before this case proceeds on the merits. Moreover, these issues are of obvious significance not only in this case but in all CERCLA cases we are litigating nationwide.

It is for these reasons that we are concerned that footnote 5 will be miscontrued as having resolved the important questions of standard of review and burden of proof in CERCLA Section 106 injunctive relief cases, CERCLA Section 107 cost recovery cases and CERCLA Section 107 cases, following issuance of a CERCLA Section 106 order. These issues are difficult and complex and deserve full briefing and argument by counsel. For example, this Court should be aware that certain statements in the footnote conflict with conclusions on the burden of proof and standard of review issues reached by other district courts

and the views of the current Senate Committee on the Environment and Public Works. See United States v. Northeastern Pharmaceutical & Chemical Company, Inc., 597 F. Supp. 823, 850-851 (W.D. Mo. 1984) (CERCLA places the burden of proof on defendants Section 107 actions to prove that costs incurred for a government remedy were "inconsistent with the national contingency plan"); New York v. General Electric Company, 592 F. Supp. 291, 304 (N.D.N.Y. 1984) (same); Report of the Senate Committee on Environment and Public Works accompanying the Superfund Improvement Act of 1985, S. Rep. No. 11, 99th Cong., 1st Sess. 57 ("This amendment clarifies and confirms that judicial review of a response action is limited to the administrative record and that the action shall be upheld (and all government response costs shall be awarded) unless the action was arbitrary and capricious or otherwise not in accordance with law") (emphasis added).

We recognize that footnote 5 may have been intended only to confirm that responsible parties need not reimburse the government in Section 107 actions for those remedial expenses which are not cost-effective, even when the remedy has previously been the subject of a Section 106 administrative order and that the additional statements were simply intended as suggestions on the standard of review and burden of proof. Nonetheless, Reilly Tar is already attempting to give footnote 5 a broader gloss (see Letter of Edward J. Schwartzbauer to the Honorable Crane Winton, April 9, 1985, p. 2) and the language in footnote 5 is sufficiently ambiguous that we believe Reilly Tar's overly broad reading can only presage similar arguments by other defendants in other CERCLA cases nationwide (this Court's slip opinion has already been repoted in the April 10, 1985 issue of the Chemical & Radiation Waste Litigation Report).

Given that this Court's opinion of April 5, 1985, is likely to be very widely read, we respectfully ask this Court to clarify, in footnote 5, that it expressly leaves for resolution in further proceedings the burden of proof and standard of review issues in actions under CERLCA Sections 106 and 107. We intend to brief these issues in full prior to trial. We would, of course, be happy to brief them now. A copy of this letter has been served on opposing counsel.

Respectfully submitted,

Donald T. Hornstein
Attorney, Appellate Section
Land and Natural Resources Division
(202) 633-2813

cc: Reilly Tar

ROUTING AND TRANSMITTAL SLIP Date 4/22/85

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REMARKS

IMPORTANT

Attached is Don's request for clarification of footnote 5 p. 20 of the Reilly Tar decision. It reflects Carol Green's and any comments. We should try to file it early this week.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

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